Supreme Court, U.S.
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No. 00-1930

IN THE

Supreme Court of the United States

Stephen Halladay Croll,

Petitioner,

v.

Mei Yee Croll,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the United States Court of Appeals for the Second Circuit correct in holding that rights of access do not constitute rights of custody within the meaning of Article 5 of the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention" or the "Hague Convention"), even when coupled with a *ne exeat* clause?

PARTIES TO THE PROCEEDING

The petitioner is Stephen Halladay Croll ("Petitioner" or "Mr. Croll"). The respondent is Mei Yee Croll ("Respondent" or "Mrs. Croll").

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Respondent respectfully submits this brief in opposition to the petition for a writ of certiorari (the "Petition" or "Pet.") filed by Respondent's former husband, Mr. Croll.

At the outset, Respondent objects to Mr. Croll's Petition because it has been filed in disregard of the Rules of the Supreme Court of the United States (the "Rules"). Specifically, on April 25, 2001 the Clerk of the Court rejected Mr. Croll's initial Petition because it did not conform with the format requirements set forth in the Rules. Pursuant to Rule 14(5), Petitioner was given sixty (60) days in which to file a "corrected petition."[1] Far from correcting the deficiencies, however, Petitioner submitted an *entirely new petition*, doubling the length, restating the question presented to the Court, citing numerous new authorities, introducing two entirely new lines of argument, and including two new "of counsel." This flouting of the Rules, which results in Petitioner arrogating to himself a 60-day extension of time to file his Petition, should not be permitted and is reason alone for this Court to deny review of this case.

If the Court nonetheless considers the Petition, it should be denied. Contrary to Petitioner's arguments, the Second Circuit's decision (a) does not give rise to a conflict between courts of the United States, nor place the United States at odds with an alleged uniform approach of other foreign signatories to the Hague Convention,[2] (b) concerns an isolated instance of what is essentially a family matter, and

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[1] S. CT. R. 14(5).

[2] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986), *implemented by* International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610.

therefore does not involve an issue of widespread public importance, and (c) in all events, is a manifestly correct interpretation of Article 5 of the Convention. Accordingly, no purpose would be served by granting the Petition.

STATEMENT OF THE CASE

Petitioner appeals from a decision of the Second Circuit[3] which correctly held "that rights of access [held by a non-custodial parent] do not constitute rights of custody within the meaning of the Hague Convention, even when coupled with a *ne exeat* clause." Pet. App. A, at 2a. Pursuant to this determination, the Second Circuit (a) reversed the district court's order directing that the parties' only child, Christina Croll, a U.S. citizen like her parents, be returned to Hong Kong and (b) remanded the case to the district court for dismissal of the petition for an order of return. The Second Circuit subsequently denied Petitioner's application for a rehearing *en banc*. This Petition followed.

It is indisputable that the purpose of the Convention is to address "parental kidnaping" where "children have been abducted *from* the *custodial* parent and taken to another country, often by the other [non-custodial] parent[] who is involved in [a] custody dispute regarding the child." H.R.

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[3] The Second Circuit's decision, a copy of which is appended to the Petition as Appendix A, has been reported at *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

Rep. No. 100-525, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 386, 386 (emphasis added).[4]

It is equally indisputable that this case does not involve kidnaping or abduction by the non-custodial parent. In fact, this case does not even arise in the context of a custody dispute between parents, here Mr. and Mrs. Croll.

Rather, by virtue of a custody order (the "Custody Order") applied for *ex parte* by Mr. Croll in Hong Kong, *see* Pet. App. B, at 65a,[5] it is undisputed that Mrs. Croll has sole "custody, care and control" of the divorced couple's only child, Christina. *See* Pet. App. A, at 2a. As Mr. Croll acknowledged before the district court, "[t]here are no custody proceedings pending in Hong Kong." Appendix ("App.")[6] at A10. By definition, therefore, Christina was not "abducted" from her custodial parent when her mother, Mrs. Croll, a United States citizen, brought Christina, also a United

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[4] *See also* Letter of Transmittal of the Hague Convention on the Civil Aspects of International Child Abduction from President Ronald Reagan to the Senate, Oct. 30, 1985, *reprinted in* 51 Fed. Reg. 10,494, 10,495 (Mar. 26, 1986); 42 U.S.C. § 11601(a)(2) (Congressional finding that "[p]ersons should not be permitted to *obtain* custody of children by virtue of their wrongful removal or retention") (emphasis added).

[5] Appendix B to the Petition contains a copy of the opinion and order of the United States District Court for the Southern District of New York, subsequently reversed by the Second Circuit, in this case. The district court's decision has been reported at *Croll v. Croll*, 66 F. Supp. 2d 554 (S.D.N.Y. 1999), *rev'd*, 229 F.3d 133 (2d Cir. 2000).

[6] These citations refer to the Appendix submitted to the United States Court of Appeals for the Second Circuit which includes, among other things, the transcripts of the district court proceedings dated June 30, 1999 and July 6, 1999, as well as Mr. Croll's Petition for Return of Child to China dated May 13, 1999.

States citizen, from Hong Kong to this country. To the contrary, Christina unquestionably was brought to this country *by her custodial parent*. In these circumstances, any order directing Christina to return to Hong Kong would subvert the intent of the Convention. Such an order would effectively wrench Christina from the arms of her custodial parent and send her to another country where no parent has even a duty to care for her. As the Second Circuit held, the Convention was not intended to produce such a perverse result.

While this likely would be true in every case in which a non-custodial parent sought to use the existence of a *ne exeat* clause in a custody order as a magical device to convert his or her rights of access into custody rights under the Convention, it undeniably is true in this case. Here, Mr. Croll chose not to be burdened by the duties of care that come with custody rights. In applying for the Custody Order, he did not seek sole custody, or even joint custody of Christina. Instead, he contented himself with a right without a duty – the right to visit Christina without the duty to care for her. Now, for purposes of this Petition only, Mr. Croll wants to transform his right of access into a right of custody – again without burdening himself with duties that correspond with such rights. Why, having carefully avoided even asking for custody (sole or joint) before the Hong Kong courts, does Mr. Croll now claim rights of custody before the courts of the United States?

The answer is readily apparent. Mr. Croll takes this position because, as he knows, "an order of return is available as a remedy *only* for . . . removals . . . 'in breach of rights of custody.'" Pet. App. A, at 9a. An order of return unquestionably is not available for removals in breach of rights of access

alone. *See id.* at 10a; *see also id.* at 25a (dissent agreeing that "the Convention draws a clear line between 'rights of custody' and 'rights of access,' reserving the remedy of return solely for breaches of the former").[7] Accordingly, for purposes of this Petition only, Mr. Croll wants this Court to transform his visitation rights under the Custody Order into "custody rights" under Article 5 of the Convention by the magic wand of a *ne exeat* clause contained in the Custody Order. The Second Circuit saw through Mr. Croll's maneuvering, which would have removed Christina from Mrs. Croll, *the parent with custody duties and obligations*, and transferred her to the country where Mr. Croll, the parent with no such duties or obligations, happens to be residing at present.[8] *See* Pet. App. A, at 16a.

Mr. Croll's effort to transform his visitation rights into "rights of custody" with the sole aim of availing himself of the Convention's Article 5 mandate that children abducted from a custodial parent be returned to the custodial parent should be rejected. The Second Circuit correctly held "that a *ne exeat* clause does not transmute access rights into rights of custody under the Convention. *Ne exeat* or not, Mr. Croll's rights include none of the powers (or burdens) of a custodial parent, and therefore are properly classified as rights of access. The Convention affords him several remedies for

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[7] *See also* Letter of Submittal of the Convention from Secretary of State George P. Schultz to President Ronald Reagan, Oct. 4, 1985, *reprinted in* 51 Fed. Reg. 10,494, 10,496 (Mar. 26, 1986) ("[t]he remedies for breach of the 'access rights' of the non-custodial parent do not include the return remedy," *i.e.*, the child's return to a different country).

[8] In her opinion, the dissenting member of the Second Circuit panel ignores that Mr. Croll has no obligation to continue to reside in Hong Kong.

trespass on those rights, but return of the child to Hong Kong is not one of them." Pet. App. A, at 24a.

Accordingly, Mr. Croll's Petition should be denied.

I. Proceedings Below

Mr. Croll filed his Petition for Return of Child to China: Hong Kong Special Administrative Region Under the Hague Convention (the "Petition for Return") in the United States District Court for the Southern District of New York on May 13, 1999. *See* App. at A6-A13. On June 29, 1999, Mrs. Croll moved to dismiss the Petition for Return under Federal Rule of Civil Procedure 12(b) on the grounds that the district court lacked subject matter jurisdiction to grant the relief sought and that the Petition for Return did not state a claim for relief. *See* Pet. App. B, at 49a-50a.

On June 30, 1999, without resolving the jurisdictional question, the district court held an evidentiary hearing. At the evidentiary hearing, Mr. Croll admitted that he had never sought custody of Christina before the Hong Kong court. *See* App. at A68.

On October 19, 1999, the district court issued an Opinion and Order denying Mrs. Croll's motion to dismiss the Petition for Return and directing that Christina be returned to Hong Kong, conditioned upon Mr. Croll's providing certain undertakings. *See* Pet. App. B, at 64a-65a.

The district court correctly held that the return remedy is available under the Convention only when the petitioning parent demonstrates by a preponderance of the evidence that a child's removal is "wrongful" within the meaning of the

Convention, and that for a removal to be "wrongful," it must be in breach of custody rights enjoyed by the petitioning parent. *See id.* at 54a-55a. The district court went on to conclude erroneously, however, that Mr. Croll had custody rights under the Convention. In so holding, the district court noted that "there is a dearth of federal case authority" on this issue. *Id.* at 56a. The district court entered judgment on October 27, 1999. *See* App. at A221.

In ordering that Christina be returned to Hong Kong, the district court relied on language in the *ex parte* Custody Order, stating that neither parent could remove Christina from Hong Kong prior to her eighteenth birthday without leave of court or consent of the other parent – a so-called *ne exeat* clause. Although this same Custody Order gave Mr. Croll only "reasonable access," while giving Mrs. Croll sole "custody, care and control," the district court held that the inclusion of a *ne exeat* clause inexplicably transformed Mr. Croll's right of reasonable access into an independent "right of custody" within the meaning of the Convention. *See* Pet. App. B, at 55a-57a.

On October 29, 1999, the district court granted Mrs. Croll's motion for a stay pending appeal. *See* App. at A222-A223; Pet. App. A, at 6a. On November 8, 1999, Mrs. Croll filed a notice of appeal to the United States Court of Appeals for the Second Circuit, *see* App. at A224-A225, and on November 30, 1999, the Second Circuit granted Mrs. Croll's application for an expedited appeal. *See* Pet. App. A at 6a.

The Second Circuit heard argument on the appeal on February 22, 2000. On September 20, 2000 it reversed, finding that Mr. Croll's right of reasonable access to Christina, even when coupled with a *ne exeat* clause, does not

constitute a right of custody under the Convention. Because Mr. Croll does not have a right of custody, the Second Circuit held that the district court did not have jurisdiction under the Convention to order Christina's return to Hong Kong. *See* Pet. App. A, at 2a-3a, 24a.

With respect to the right to veto expatriation to another country or territory conferred by a *ne exeat* clause, the Second Circuit found that the Convention "does not contemplate return of a child to a parent whose sole right – to visit or veto – imposes no duty to give care." Pet. App. A, at 16a. The Second Circuit explained that to hold otherwise would substitute the remedy of return, expressly reserved by the Convention for breaches of the right of custody, for the remedy provided by the Convention under Article 21 for breaches of the right of access. *See id.* at 23a.

Following the Second Circuit's decision, Petitioner filed a petition for a panel rehearing and a petition for rehearing *en banc*. The Second Circuit denied the petitions by order dated January 25, 2001. *See* Pet. App. C,[9] at 66a-67a.

Petitioner then filed his initial petition for a writ of certiorari on April 25, 2000. At that time, Robert D. Arenstein was Petitioner's only counsel. Subsequently, after the Clerk of the Court rejected the Petition because of its failure to comply with the Rules, Petitioner filed the Petition now before the Court. This time, Mr. Arenstein is joined as counsel by William Hilton, Esq. and Linda Silberman, Esq.

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[9] Appendix C to the Petition contains a copy of the order of the United States Court of Appeals for the Second Circuit denying Petitioner's petitions for panel rehearing and rehearing *en banc*.

Petitioner cites copiously to the latter as "support" for his tortured reading of the Convention.

II. Factual Background

Mr. Croll, Mrs. Croll and Christina Croll are all citizens of the United States. Mr. and Mrs. Croll were married in 1982 and have been living since that time in Hong Kong. Christina, now 11 years of age, was born in Hong Kong. Mr. and Mrs. Croll separated in February of 1998. After their separation, Christina continued to live with her mother in Hong Kong. *See* Pet. App. A, at 3a; *id.* App. B, at 50a.

On or about April 2, 1999 – after Mr. and Mrs. Croll had separated – Mrs. Croll and Christina traveled to New York during Christina's spring school break. *See* Pet. App. A, at 4a; App. at A98. Christina traveled on a round trip airline ticket. *See* App. at A103. Prior to leaving, Mrs. Croll called Mr. Croll's office to inform him of the trip, but was told that he was away on business. She left a message for him at his office. *See* App. at A98-A99.

The purpose of the trip was for Christina to interview with schools for admission the following school year. Mrs. Croll intended to return to Hong Kong after selecting a school for Christina and then to permanently move home to the United States in July or August 1999. *See* Pet. App. A, at 4a; App. at A103. After Christina and her mother arrived here, Mrs. Croll discussed with her family in New York the physical violence and harassment that Mr. Croll had subjected her to in Hong Kong. *See* App. at A104. At her family's urging, and as part of preparing to move home with Christina to New York for the following school year, Mrs. Croll

commenced an action in Family Court in New York County seeking sole custody of Christina, child support, and an order of protection. *See* Pet. App. A, at 4a. She then caused Mr. Croll to be served with these papers in Hong Kong. *See* App. at A104.

When she returned to the Family Court on May 17, 1999, Mrs. Croll was served with Mr. Croll's Petition for Return before the district court seeking an order under Article 5 of the Convention directing Christina to return to Hong Kong. Thereafter, at the evidentiary hearing held by the district court, Mr. Croll conceded that the Custody Order he obtained *ex parte* granted sole custody, care and control to Mrs. Croll and that he never sought custody of Christina. *See* App. at A68, A80. He also admitted that he never personally gave Mrs. Croll a copy of the Custody Order, *see* App. at A81; that he never mentioned to her that he obtained the Custody Order or discussed its terms with her, *see* App. at A82; and that he never made any attempt to restrict Christina's passport or otherwise prevent her from leaving Hong Kong. *See* App. at A85-A86; Pet. App. B, at 60a.

REASONS THE PETITION SHOULD BE DENIED

I. This Case Does Not Present a Conflict Between the Courts of the United States.

The Hague Convention was executed in 1980, and came into force in the United States in 1988. When implementing the Convention, Congress noted that one of the principal problems it was designed to prevent was persons "obtain[ing] custody of children by virtue of their wrongful removal or retention." 42 U.S.C. § 11601(a)(2).

Since the Convention came into force, it has been universally accepted that rights of access do not constitute, and are not synonymous with, custody rights under the Convention. As a consequence, a breach of a right of access does not give rise to the right of return under Article 5. *See* Pet. App. A, at 9a-10a, 25a. Also since the Convention came into effect, the Second Circuit on the particular facts of this case is the only United States Court of Appeals to have considered whether a *ne exeat* clause somehow converts rights of access into custody rights under the Convention. Indeed, after the district court noted that there was a "dearth of federal case authority" addressing this issue, Pet. App. B, at 56a, the Second Circuit observed that it "and the district court in this case are the only courts in the United States to consider whether rights of access coupled with a *ne exeat* clause confer 'custodial rights' on a non-custodial parent within the meaning of the Hague Convention." Pet. App. A, at 7a. In these circumstances, Petitioner's assertion that the Second Circuit's ruling is inconsistent with holdings of other U.S. courts, *see* Pet. at 3, 17, is patently misleading. Simply stated, the district court and Second Circuit are the only federal courts to have considered this issue. *A fortiori* there is no split of authority among Circuits suggesting review by this Court.

II. This Case Does Not Present a Conflict Between the Courts of the United States and a State Court of Last Resort.

The Second Circuit's decision also is not in conflict with a decision by a State court of last resort. The only State courts that Petitioner even claims to have considered this issue are two State courts of first instance, *see* Pet. at 17-18 (citing *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (Fam. Ct.

1991) and *D'Assignies v. Escalante*, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991), *available at* http://www.hcch.net/incadat/fullcase/0198/htm)), and one intermediate appellate court in Kentucky, *see* Pet. at 18 (citing *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000)). Not one of the three courts is a court of last resort and, *a fortiori*, not one of the courts' rulings results in a conflict between a State court of last resort and the Second Circuit. In any event, each of the decisions of the three lower courts is readily distinguished from this case.[10]

For example, the award of sole "custody, care and control" to Mrs. Croll in this case is permanent and there are no custody proceedings pending before any court.[11] In stark contrast, both *Janakakis-Kostun* and *D'Assignies* concerned removals by a parent during ongoing custody battles. *See Janakakis-Kostun*, 6 S.W.3d at 849; *D'Assignies*, slip op. at 8-9.

Specifically, *Janakakis-Kostun* involved removal of a child by the mother during a custody battle that ultimately resulted in a Greek court awarding custody of the child to the father. *See* 6 S.W.3d at 849. Similarly, *D'Assignies* involved an *interim* court order that awarded *temporary* custody to the

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[10] Furthermore, the Second Circuit plainly was not bound by these State court decisions and clearly did not find them persuasive.

[11] This fact is significant because, as noted earlier, the purpose of the Convention is to address cases *unlike this* in which "children have been abducted *from* the *custodial* parent and taken to another country, often by the other parent[] who is involved in [a] *custody dispute* regarding the child." H.R. Rep. No. 100-525, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 386, 386 (emphasis added). As stated, there is no custody dispute in this case. *See* App. at A10.

mother but also required the primary residence of the children to be close to father, granted the father extensive visitation rights while permanent custody was being decided, ordered the children's passports to be delivered to Court, and ordered the mother not to leave France. *See D'Assignies*, slip op. at 3. In contrast, the Custody Order in this case was silent as to Christina's primary residence, did not direct Mrs. Croll to deliver Christina's passport to the court, and placed no limitations on Mrs. Croll's right to leave Hong Kong at any time.[12] In these circumstances, it is hardly surprising that even the dissent found these cases to be "of limited utility because they fail precisely to define 'custodial rights' or to differentiate them from access rights." Pet. App. A, at 43a n.8.

In short, factually dissimilar decisions by lower courts of three States provides no basis for review of the Second Circuit's decision in this case.

III. This Case Is Not One of Widespread Public Importance: It Does Not Affect a Broad Class of Persons.

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[12] Likewise, in *Janakakis-Kostun* and *David S.*, the family courts ordered the remedy of return because one parent acted in *deliberate contempt* of a court order during ongoing custody proceedings. *See Janakakis-Kostun*, 6 S.W.3d at 849 (finding that mother acted in contempt in removing child during pending proceeding); *David S.*, 574 N.Y.S.2d at 432 (stating that mother's argument that the father was not entitled to the return remedy because he had only access rights "might have some merit but for the [mother's] contemptuous conduct"). Here, Mrs. Croll was not even aware that bringing Christina to the United States was in derogation of the Custody Order's *ne exeat* clause and thus the reasoning of these lower courts is wholly inapplicable in this case.

Given the isolated instances with which this issue has arisen in any court located anywhere in the United States, this case is not of sufficient public importance to warrant review by this Court. This clearly is not a case where review will impact thousands of persons.

In fact, this case is essentially a family dispute. The issues of family care and control present on the facts of this case are not generalizable to many other litigants. For example, the manner in which Mr. Croll obtained the *ex parte* Custody Order expressly avoiding any duty of care associated with a right of custody is not present in any of the other cases from the State courts or the foreign courts cited to by Mr. Croll. Accordingly, there is no reason to review this fact-specific case.

IV. There is No "Accepted International Understanding" on This Issue; Accordingly, Petitioner's Claim That the Second Circuit's Decision Would Result In "Disuniformity" Is Without Merit and in All Events Would Not Provide a Basis For Review.

Petitioner presents a single question for review by this Court:

> Does a *ne exeat* order restricting removal of a child from a country create "custody rights" within the definition of this term in Article 5 of the Hague Child Abduction Convention . . . or should courts in the United States depart from this accepted international understanding, thereby creating disuniformity with re-

spect to interpretation of an international treaty?

Pet. at i. Contrary to Petitioner's characterization, there is no "accepted international understanding," nor is there an "overwhelming weight of case authority in other countries." *Id.* at 3. Rather, as the Second Circuit correctly found, "[n]o consensus view emerges from the opinions issued by the courts of the signatory nations." Pet. App. A, at 22a; *see also id.* at 23a (describing foreign cases as "few, scattered, conflicting, and sometimes conclusory and unreasoned").

Thus, and in contrast to Petitioner's claim of uniformity among the courts of other signatory nations in his favor, the highest court of Canada has twice rejected the proposition that a *ne exeat* clause always gives rise to a right of custody under the Convention. *See D.S. v. V.W.*, [1996] 134 D.L.R.4th 481, 502-03 (Can.) (rejecting argument that custodial parent's removal of a child in violation of access rights creates a custody right in favor of the non-custodial parent because such an interpretation would afford the same protection to access rights as custody rights, in contravention of the Convention); *Thomson v. Thomson*, [1994] 119 D.L.R.4th 253, 281 (Can.) (distinguishing non-removal clauses in interim orders from those in final orders and also recognizing the serious implications such clauses have on the mobility rights of custodial parents).[13] And at least one court

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[13] Mr. Croll cites *Thorne v. Dryden-Hall*, [1997] 148 D.L.R.4th 508 (B.C. Ct. App.), a lower court opinion in Canada, as a counterpoint to the two cases in which the Supreme Court of Canada indicated that a *ne exeat* clause does not transform rights of access into custody rights under Article 5. Significantly, the custody order in *Thorne* "states simply that 'the child shall live with [the mother]'" and unlike the instant case "leaves to both

(continued...)

in France has rejected the proposition that a right to veto expatriation amounts to a right of custody. *See Proc. Rép. Périgueux c. Mme. Y*, T.G.I. Périgueux, Mar. 17, 1992, D. 1992, 315 (Fr.) (holding that the Hague Convention does not intend to defeat the custodial parent's fundamental freedom to expatriate, and the right violated when a child was removed to France was "secondary" and not a violation of custody rights).[14] Because courts of other signatory nations have rejected the proposition that a *ne exeat* clause always gives rise to a right of custody under the Convention, clearly there is no "accepted international understanding." The Second Circuit's supposed departure from the decisions of some other signatory nations does not provide a basis for review by this Court. Regardless of how this Court were to rule, it would not result in uniformity among all signatory nations.

In this regard, in making the sweeping and unsupported claim that "case law from other countries overwhelmingly supports" his position, Pet. at 19, Petitioner relies on a handful of what he characterizes as "landmark rulings." *Id.* at 21. Petitioner's labeling of these cases as the last word on this issue for certain countries is questionable at best. For

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[13] (...continued)
parents the remaining parental rights and responsibilities." *Id.* at 513. Based on this language, the *Thorne* court found that the removal of the children from Canada by the mother was in breach of the father's *equal rights of custody*. *See id.* Obviously, a case in which the parents have equal rights of custody is vastly different than one such as this in which the parent seeking the return of a child has rights of access only. Although *Thorne* highlights the fact-specific nature of the inquiry in each of these cases, it does not suggest that the Canadian Supreme Court would change its view on this issue.

[14] Even the dissent in the Second Circuit recognized "that courts in France appear divided on this issue." Pet. App. A, at 44a n.9.

example, a United States district court's discussion of German legal proceedings clearly is not first-hand evidence of Germany's state of the law on this issue. *See Morton v. Morton*, 982 F. Supp. 675, 683-84 (D. Neb. 1997) (Pet. at 20-21) (excerpting a portion of a German court opinion with no indication of that court's reasoning).[15] Petitioner's reliance on *In the Marriage of Resina & Resina*, (1991) Appeal No. 52 of 1991 Hague Convention (Child Abduction) Regulations (Austl. Fam. Ct.), is equally inapposite. That case concerned an uncontested appeal in which the judge who authored the opinion noted that the court had the benefit of argument of only one side. *Id.* ¶ 24. The family court judge suggested that his opinion was not the definitive word on the subject but that "a later Full Court of this Court may on a fuller analysis of the issue wish to consider the matter further." *Id.* This ruling, from a family court of first instance, plainly cannot be considered "the last word" on how a full court (federal or state) sitting in Australia would determine this issue.

Likewise, every other case cited by Petitioner is readily distinguished from the instant case. For example, this case is manifestly different than one in which the custody order and *ne exeat* clause were obtained *by consent*. *See, e.g.*, *C v. C*, [1998] 1 W.L.R. 654 (Eng. C.A.) (construing a *consent* order making the parents *joint guardians*, but granting custody to one parent and providing that neither parent remove the child from Australia without the consent of the other). In this case Mrs. Croll did not agree to this

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[15] Indeed, as described by the district court, the German court appears to have short-circuited its own initial conclusion that visitation rights are not synonymous with custody rights, *see Morton*, 982 F. Supp. at 683, because a Utah state court entered a permanent award of custody to the petitioning father. *See id.*

restriction on Christina's, and consequently her own, mobility rights.[16] Relatedly, at the time Mrs. Croll and Christina left Hong Kong, Mrs. Croll was not aware that there was a *ne exeat* order in effect, and therefore did not act in deliberate disregard of a court order. *Compare Ministère Public c. M. B.*, CA Aix-en-Provence, Mar. 23, 1989, 79 Rev. crit. 1990, 529, note Y. Lequette (Fr.) (ordering return when father, who had custody of the children but was required to obtain the written consent of either the mother or the judge to remove the children from England or Wales, sought permission from neither the mother nor the judge before taking the children to France and thus knowingly violated the custody order).

Moreover, pursuant to the Custody Order in this case, Mrs. Croll has permanent custody of Christina. In contrast, one of the petitioner's so-called "landmark cases," *Sonderup v. Tondelli*, Dec. 4, 2000, Case CCT 53/00 (S. Afr. CC) (copy submitted with Petition as separate Lodging ("Pet'r Lodging")), involved an "*interim agreement* between the parties that [the child] would be returned to her country of habitual residence by a particular date, and that 'the issues of custody and access be set for trial at the earliest dates . . . available for counsel and the court registry.'" Pet'r Lodging at L-8 (emphasis added). Notably, while the Constitutional Court of South Africa held that the violation of the *ne exeat* clause in the *interim agreement* was a breach of the father's custody rights, that court did not announce a *per se* rule that a *ne exeat* clause always creates a right of custody. Instead, that court

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[16] A *ne exeat* clause implicates serious liberty interests, including the mobility rights of the custodial parent. Mrs. Croll's ability to return to the country of which she and her child are citizens, *i.e.* the United States, must therefore not be dictated by an erroneous reading of the Convention that would convert rights of access into rights of custody by operation of a *ne exeat* clause to which she did not consent.

held that "a non-removal provision can, *depending on the circumstances*, confer a right of custody." *Id.* at L-7 (emphasis added).

Importantly, the South African Court recognized that "the facts in *Croll* are not identical to those in the present case." Pet'r Lodging at L-8. It recognized that it was "not dealing only with a non-removal provision in a final custody agreement," *id.*, but an interim order in a case in which the issues of custody and access were not settled and there was an express agreement that the child would return to British Columbia by a date certain for final determination of all custody issues.

Finally, it is worth noting that even if an international consensus on this issue did exist (which it does not), the Second Circuit would not have been obligated to supplant and subordinate its manifestly correct reasoning in this case to avoid, in Petitioner's phraseology, "disuniformity." Mr. Croll notes that in enacting the Hague Convention, Congress stated a general objective of "uniform international interpretation of the Convention." Pet. at 6 (citing 42 U.S.C. § 11601(b)(3)(B)). While such declaration may be referred to for guidance, it is not a substantive part of the law binding on the courts. *See Block v. Hirsh*, 256 U.S. 135, 154 (1921) ("No doubt it is true that a legislative declaration of facts that are material only as a ground for enacting a rule of law . . . may not be held conclusive by the Courts."); *see also* 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 20.12 (5th ed. 1993).

Further, in stating this objective, Congress could not have intended for the courts of the United States to subordinate their reading of the Convention in favor of decisions of

foreign courts, particularly where those decisions primarily are from courts of first instance and turn on their individual facts. In short, Congress undoubtedly did not intend for the Second Circuit to be bound by the decisions of inferior courts abroad such as the Family Courts of England, *see Re H*, [1990] 2 Fam. 439 (Eng.), or Australia. *See In the Marriage of Resina & Resina*, (1991) Appeal No. 52 of 1991 Hague Convention (Child Abduction) Regulations (Austl. Fam. Ct.).

In conclusion, there is no single "accepted international understanding" on the fact-specific issue presented in this case. Because decisions by the courts of foreign signatories are and will continue to be decidedly mixed, ebbing and flowing with the particular facts involved, the purported "disuniformity" of which Mr. Croll complains will exist regardless of whether this Court reviews the case. Thus, this is not a basis on which to grant certiorari.

V. The Second Circuit's Interpretation of Article 5 of the Hague Convention Was Correct.

Recognizing there is no conflict between courts of the United States or an issue of widespread public importance sufficient to justify review, Petitioner strains to establish that this case presents an "important question of federal law that has not been, but should be, settled by this Court." S. CT. R. 10(c). Petitioner asserts that the Second Circuit failed to interpret the Convention "according to appropriate rules of treaty interpretation," Pet. at 8, and that the majority's reasoning was "simplistic and erroneous", *id.* at 10, and "wrong and extremely parochial." *Id.* at 17. On these grounds, petitioner warns of "potential diplomatic embarrassment for the United States." *Id.* at 6. Petitioner's argument is illogical and unsupported, and, in all events, does not

provide a reason for this Court to review the Second Circuit's decision.

A. The Second Circuit Was Correct In Holding That Mr. Croll Did Not Have Custody Rights Within the Meaning of of the Convention.

Petitioner's assertion that the Second Circuit interpreted the Convention parochially and simplistically lacks even a semblance of credibility. Even a cursory review of the Second Circuit's opinion demonstrates that before reaching its conclusion, the Second Circuit carefully analyzed the plain language of the Convention. To ascertain the ordinary meaning of the word "custody," the Second Circuit surveyed several dictionary definitions[17] and concluded:

> Taking these definitions together, custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things. . . .
>
> Nothing in the Hague Convention suggests that the drafters intended anything other than this ordinary understanding of custody.

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[17] This is consistent with the Vienna Convention on the Law of Treaties ("Vienna Convention"), which provides that "[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331 (emphasis added).

Pet. App. A, at 12a.

The Second Circuit then rejected Petitioner's argument that because the Convention defines custody as "rights relating to the care of the person of the child . . . in particular, to determine a child's place of residence," the *ne exeat* clause in the Custody Order gave Mr. Croll a "right of custody" within the meaning of the Convention. *See* Pet. App. A, at 13a. The Second Circuit explained that while "[t]he *ne exeat* clause limits Mrs. Croll's custodial power to expatriate Christina, . . . it does not suggest that the power to 'determine' Christina's 'place of residence' (in Hong Kong, New York, or anywhere else) is also Mr. Croll's." Pet. App. A, at 14a. This reasoning is clearly correct.

While the plain language of the Convention alone provides sufficient basis to reject Petitioner's arguments, to the extent there is any ambiguity in the text of the Convention, the Second Circuit's interpretation also enjoys extra-textual support.[18] As explained by Elisa Perez-Vera, official reporter of the conference, the drafters of the Convention made a conscious determination that although "problems . . . can arise from a breach of access rights, especially where a child is taken abroad by its custodian, . . . the majority view was that such situations could not be put in the same category as the wrongful removals from the custodial parent which it

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[18] Under the Vienna Convention, recourse may be had to supplementary means of interpretation only if interpretation according to the ordinary meaning of terms in their context leads to ambiguous or manifestly absurd results. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 32, 1155 U.N.T.S. 331.

sought to prevent."[19] Because the terms of the Custody Order give Mr. Croll rights of access only, the outcome he is urging on this Court would elevate his right of access to the level of a far greater right of custody with its corresponding duty of care, a duty which Mr. Croll affirmatively disavowed in the Custody Order fashioned by him. This is directly contrary to the intentions of the drafters. As Ms. Perez-Vera further explained:

> A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.[20]

The position taken by Mr. Croll also is contrary to the understanding of the Chairman of the Hague Conference that drafted the Convention, Professor A.E. Anton. In an article that Petitioner attempts to discredit in favor of Petitioner's

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[19] Elisa Perez-Vera, *Explanatory Report in* 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTS DE LA QUATORZIEME SESSION 6 AU 25 OCTOBRE 1980: CHILD ABDUCTION 426, 444-45, ¶ 65 (Permanent Bureau of Hague Conf. on Private Int'l Law, ed. & trans., 1982).

[20] Perez-Vera, *supra*, at 445, ¶ 65.

own counsel's views as to what the Convention *should* say,[21] Professor Anton stated unequivocally:

> [The] right simply to give or withhold consent to changes in a child's place of residence *is not to be construed as breach of rights of custody in the sense of Article 3*. A suggestion that the definition of "abduction" should be widened to cover this case was not pursued.

A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 546 (1981) (emphasis added).[22]

In its opinion, the Second Circuit noted that "[t]he Convention rests on the principle that a child's country of

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[21] Petitioner cites "of counsel" Linda Silberman as a "leading authorit[y]," Pet. at 7, to support his effort to extend the reach of the Convention beyond its text to include the return remedy for rights of access. However, repeated citations to articles authored by Ms. Silberman (*see* Pet. at 7, 10-11, 14, 19, 23), no matter how numerous, cannot override the plain language of the Convention.

[22] Petitioner maintains this publication is the "personal view" of Professor Anton and "should not be permitted to trump persuasive and contrary evidence as to the intention of the drafters of the Convention as a whole." Pet. at 13. Petitioner fails to explain, however, how the authors of the secondary sources on which he relies, including secondary sources authored by his own counsel, are more persuasive on the intention of the drafters than Professor Anton, who chaired the Conference that drafted the Convention. Moreover, Petitioner's characterization appears to be at odds with that of his own counsel, William Hilton, who includes this very article on his website as "[a] comprehensive, well written, scholarly article that covers the history of the Convention, its application, etc. A must read." William Hilton, *Anton: Article on the Hague Convention (Jul 1981), available at* http://www.hiltonhouse.com/File.htm.

'habitual residence' is 'best placed to decide upon questions of custody and access.'" Pet. App. A, at 8a (citation omitted). In appealing to this Court, Mr. Croll is asking this Court to transform his rights of access, as finally determined by the Hong Kong courts, into rights of custody. Doing so, however, would be to reach the underlying merits of custody matters that Mr. Croll himself settled when he obtained the Custody Order *ex parte* in Hong Kong. Under the Convention, courts are prohibited from reaching the merits of any underlying custody claims. *See* Convention, art. 16, *reprinted in* 51 Fed. Reg. at 10,500; 42 U.S.C. § 11601(b)(4); *see also* Pet. App. A, at 11a; *id.* App. B, at 54a.

As detailed earlier, the practical effect of the district court's order to return Christina to Hong Kong would have removed Christina from Mrs. Croll, the parent *with* custody duties and obligations and transferred her to the country of Mr. Croll, the parent who specifically avoided placing custody duties upon himself when he applied *ex parte* for the Custody Order awarding sole custody to Mrs. Croll. The Second Circuit was acutely aware of the peril such order would have visited upon Christina:

> If we were to enforce rights held pursuant to a *ne exeat* clause by the remedy of mandatory return, the Convention would become unworkable. *A foundational assumption in the Convention is that the remedy of return will deliver the child to a custodial parent who (by definition) will receive and care for the child.* It does not contemplate return of a child to a parent whose sole right — to visit or veto — imposes no duty to give care.

Pet. App. A, at 16a (emphasis added).

The dissent's failure to deal with this issue is noteworthy. The dissent characterizes the majority's concern that Christina would not receive sufficient care upon her forced return to Hong Kong as "strain[ing] credulity." Pet. App. A, at 36a n.4. The dissenting judge assumes that because Mr. Croll supposedly has "searche[d] the world for his child to get her back," he has the desire and capability to provide adequate care. *Id.* That assumption, questionable at the best of times, simply has no basis in reality in this case. It ignores the fact that, by his own choice, Mr. Croll studiously avoided any duties of care associated with a right of custody.

In sum, the Second Circuit exhaustively reviewed "(A) the purpose and design of the Convention, (B) its wording, (C) the intent of its drafters and (D) caselaw in other signatory states." Pet. App. A, at 7a. Only after conducting this thorough analysis did the Second Circuit conclude that

> *[e]very textual and structural feature of the Convention* suggests that a parent who furnishes no custodial care cannot establish "wrongful removal," and therefore cannot prevail on a petition to a foreign court for an order of return.

Id. at 18a (emphasis added). The Second Circuit's decision is fully consistent with the plain language of the Convention, which explicitly makes a bright line distinction between rights of custody and rights of access. Given the Convention's clarity on its face, Petitioner's effort to read extra-statutory language into the Convention that affects appropriate rules of treaty construction amounts to a blatant invitation to this

Court to engage in judicial activism.[23] *See* Pet. App. A, at 21a-22a.

B. Even If The *Ne Exeat* Clause Somehow Did Transform Mr. Croll's Visitation Rights Into Rights of Custody, He Failed to Exercise Those Rights and, Therefore, Is Not Entitled to an Order of Return.

The Second Circuit phrased the question before it as whether Mr. Croll both held *and* actively exercised "rights of custody" within the meaning of the Convention, *see* Pet. App. A, at 5a. Noting that the issue bears on subject-matter jurisdiction, the Second Circuit found that "[t]he right conferred by the *ne exeat* clause is not one that Mr. Croll 'actually exercised,' and it is circular to say that he would have exercised it *but for* Christina's removal, because the right itself concerns nothing but removal itself, and would never have been exercised had Mrs. Croll been content to stay in Hong Kong during Christina's minority." *Id.* at 16a.

If Mr. Croll has custody rights (which he does not), he does so only be because of the *ne exeat* clause in the Custody Order. (As noted above, it is undisputed that a right of access without a *ne exeat* clause does not amount to a right of custody under the Convention.) Accordingly, in order to determine whether Mr. Croll was exercising his contorted "custody rights" on the facts of the case, the Court must focus

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[23] *Compare Alexander v. Sandoval*, 121 S. Ct. 1511, 1520 (2001) (noting that "[h]aving sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink" and limiting the search for Congressional intent to "the *text* and *structure* of Title VI") (emphasis added)).

on what Mr. Croll did to exercise his *ne exeat* rights. The answer is he did nothing. While Mr. Croll could have requested that Christina's passport be held by the Hong Kong court, he did not do so. *See* Pet. App. B, at 60a; *cf. D'Assignies,* slip op. at 3. Alternatively, the Custody Order provided that "'[e]ither parent may request the Immigration Department not to issue passports allowing the said child to go abroad without his/her knowledge.'" Pet. App. A, at 27a n.2; *see id.* App. B, at 51a. Clearly, Mr. Croll made no such request to the Immigration Department. *See* Pet. App. B, at 60a; App. at A85-A86; *cf. D'Assignies,* slip op. at 3. Thus, at the time Mrs. Croll and Christina left the country, Mr. Croll was not exercising his rights under the *ne exeat* clause. Therefore, even if such clause did somehow magically transform Mr. Croll's right of access into a right of custody under Article 5 of the Convention (which it does not), Mr. Croll was not exercising this purported custody right at the time of Christina's departure.[24] Accordingly, the district court would be without jurisdiction to enter an order of return in this case in all events.

Finally, under Article 3 of the Convention, custody rights "arise by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law" of the State in which the child was resident. Convention, art. 3, *reprinted in* 51 Fed. Reg. at 10,498; *see, e.g., Thorne v. Dryden-Hall,* [1997] 148 D.L.R.4th 508 (B.C. Ct. App.) (assessing custody based on the rights and responsibilities set out in the U.K.'s Children

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[24] The district court found that Mr. Croll was exercising his rights of custody at the time of Christina's departure. However, it erroneously focused on whether Mr. Croll was exercising his rights of *access*, not rights of *custody*. *See* Pet. App. B, at 59a.

Act of 1989). In this case, Mr. Croll failed to present any evidence whatsoever concerning how the laws of Hong Kong define custody rights and what law its choice of law rules would apply to a custody dispute between two foreign citizens residing in Hong Kong with their child who is also a foreign citizen. *See Shalit v. Coppe*, 182 F.3d 1124, 1129 (9th Cir. 1999) (stating that declaration by counsel that petitioner has custody under Israeli law does not satisfy burden of proof under the Convention). As a result, the task before the district court and the Second Circuit was simply to construe the plain language of the Custody Order. *Cf. Thomson v. Thomson*, [1994] 119 D.L.R.4th 253, 280 (Can.) (noting that because the petition presented no evidence of the legal effect of the non-removal provision under the law of the child's habitual residence, the court would interpret the clause according to general principles). The Second Circuit did so ably and thus there is no basis for review.

CONCLUSION

For the foregoing reasons, Mrs. Croll respectfully submits that the petition for a writ of certiorari be denied.

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